

**FILED BY CLERK**

**APR 14 2010**

COURT OF APPEALS  
DIVISION TWO

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION TWO

THE STATE OF ARIZONA,	)	
	)	
Respondent,	)	2 CA-CR 2009-0359-PR
	)	DEPARTMENT B
v.	)	
	)	<u>MEMORANDUM DECISION</u>
	)	Not for Publication
ANTHONY JAMES BANN,	)	Rule 111, Rules of
	)	the Supreme Court
Petitioner.	)	
_____	)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. CR200600678

Honorable Boyd T. Johnson, Judge

REVIEW GRANTED; RELIEF GRANTED IN PART

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Anthony J. Bann

Buckeye  
In Propria Persona

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E C K E R S T R O M, Presiding Judge.

¶1 Pursuant to a plea agreement, petitioner Anthony Bann was convicted of second-degree murder and sentenced to a mitigated term of fourteen years in prison. The trial court denied relief in Bann's timely, of-right post-conviction relief proceeding. Bann seeks review of the court's subsequent denial of his motion to reconsider that

ruling. He asks that we remand the case and direct the court to give him another opportunity to file a pro se petition.

¶2 We review a trial court's decision granting or denying post-conviction relief for an abuse of discretion. *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). Because we find the court abused its discretion in denying Bann's motion for reconsideration without an evidentiary hearing, we grant relief in part and remand the case to the trial court for further proceedings.

### **Background**

¶3 Bann filed his of-right notice of post-conviction relief in September 2006, and the trial court appointed counsel in accordance with Rule 32.4(c)(2), Ariz. R. Crim. P. After counsel filed a notice stating she could find no colorable claims to raise on Bann's behalf, the court extended the petition's filing deadline to afford Bann the opportunity to proceed in propria persona. *See id.*

¶4 Before Bann's pro se petition was due, however, he filed a motion for change of counsel, and his Rule 32 counsel filed a motion to withdraw, citing irreconcilable differences. The trial court granted the motions and appointed new counsel who, after reviewing the record, also notified the court that he could find no colorable Rule 32 claims to raise on Bann's behalf. On July 22, 2009, in accordance with Rule 32.4(c)(2), the court again granted Bann leave to file a pro se petition, with a new filing deadline of September 4, 2009. On September 17, 2009, the trial court denied relief, finding Bann had failed to file a supplemental petition before the new deadline and so had failed to state a colorable claim under Rule 32.

¶5 A week later, Bann filed a motion for reconsideration, which we construe as a motion for rehearing pursuant to Rule 32.9(a). In his motion, Bann alleged he never had received counsel’s July 1 notice to the trial court or the court’s July 22 order extending the petition’s deadline to September 4. He asserted that the last legal mail he had received, before the court’s order denying all relief, was a June 30, 2009 letter from counsel informing him of counsel’s intention to file a Rule 32.4(c)(2) notice with the court. He also maintained his non-receipt of the court’s order could “be verified by A[rizona] D[eartment] O[f] C[orrections (ADOC)] mailroom staff, through [ADOC’s] legal mail documents.” The court denied Bann’s motion without comment.

¶6 In his petition for review, Bann argues the trial court erroneously denied his motion for reconsideration, stating he “could not have complied with” the court’s July 22 order granting leave to file a pro se brief by September 4, “in that he did not receive this order.” Along with his petition, Bann has filed what purports to be ADOC’s response to his records request, indicating that Bann had received no legal mail between July 3 and September 19, 2009.<sup>1</sup> He maintains the court should have given him an opportunity “to provide documentation that it[]s order wasn’t delivered” before denying his motion. We agree.

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<sup>1</sup>According to Bann, time constraints prevented him from filing this documentation with his motion. *See* Ariz. R. Crim. P. 32.9(a) (motion for rehearing must be filed “within fifteen days after the ruling of the court”).

## Discussion

¶7 Because a defendant who pleads guilty waives the right to a direct appeal, *see* Rule 17.1(e), Ariz. R. Crim. P., Rule 32 is “the only means available for exercising the constitutional right to appellate review.” *Montgomery v. Sheldon*, 181 Ariz. 256, 258, 889 P.2d 614, 616 (1995), *overruled in part on other grounds by State v. Smith*, 184 Ariz. 456, 459, 910 P.2d 1, 4 (1996). Accordingly, a defendant who pleads guilty “has a constitutional right to file a *pro se* [post-conviction relief] petition if appointed counsel refuses to do so” in an of-right Rule 32 proceeding. *Id.* at 261, 889 P.2d at 619, *overruled in part on other grounds by Smith*; *see also* Ariz. R. Crim. P. 32.1, 32.4(c)(2). In its July 22 order, the trial court complied with *Montgomery* and Rule 32.4(c)(2) by affording Bann a forty-five-day extension in which to file his *pro se* petition. But if Bann never received the order, as he maintains, his right to file a *pro se* petition was rendered illusory.<sup>2</sup> We conclude Bann has stated a colorable claim of extraordinary circumstances that, if established by the evidence, entitles him to an extension of time to file his *pro se* petition. *See State v. Rosario*, 195 Ariz. 264, ¶ 11, 987 P.2d 226, 228 (App. 1999); *see also* Ariz. R. Crim. P. 32.4(c)(2) (after counsel notifies trial court of inability to identify colorable claims, defendant entitled to forty-five days to file *pro se* petition; “Any extensions beyond the 45 days shall be granted only upon a showing of extraordinary circumstances.”).

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<sup>2</sup>Although the trial court also entered findings that appear to reflect its own review of the record for error, such a review is no substitute for a pleading defendant’s right to file a *pro se* petition when counsel has declined to file a petition on his behalf. *See Montgomery*, 181 Ariz. at 259-60, 889 P.2d at 617-18, *overruled in part on other grounds by Smith*.

¶8 In reaching this conclusion, we find guidance from *Rosario*, 195 Ariz. 264, ¶ 5, 987 P.2d at 227, which addressed the analogous situation of an incarcerated defendant whose notice of post-conviction relief, although filed, had been found untimely. The court held a prison inmate’s petition must be deemed filed when delivered to prison authorities for mailing, despite delayed filing with the clerk of court. *Id.* ¶¶ 9-10. Relying on *Houston v. Lack*, 487 U.S. 266, 271 (1988), the court reasoned that a “‘*pro se* prisoner has no choice but to entrust the forwarding of his notice of appeal to prison authorities whom he cannot control or supervise and who may have every incentive to delay.’” *Rosario*, 195 Ariz. 264, ¶ 9, 987 P.2d at 228, quoting *Mayer v. State*, 184 Ariz. 242, 244, 908 P.2d 56, 58 (App. 1995). Similarly, here, Bann had no choice but to rely on prison authorities to deliver his legal mail. Rule 32 deadlines are not jurisdictional, and Bann’s failure to file a *pro se* petition before the court’s deadline is excusable if he can establish a valid reason for his non-compliance. *See State v. Pope*, 130 Ariz. 253, 255, 635 P.2d 846, 848 (1981) (trial court may consider late-filed motion for rehearing if valid reason presented for failure to meet filing deadline). Lack of notice of the deadline would constitute such a valid reason. *Cf. State v. Grange*, 130 Ariz. 250, 251-52, 635 P.2d 843, 844-45 (1981) (petitioner who timely filed motion for rehearing with judge, consistent with practice, had valid reason excusing untimely filing with clerk); *Haroutunian v. Valueoptions, Inc.*, 218 Ariz. 541, ¶ 28, 189 P.3d 1114, 1124 (App. 2008) (1994 amendments to Rule 9(a), Ariz. R. Civ. App. P., and Rule 6(b), Ariz. R. Civ. P., permitting time enlargement due to non-receipt of order or judgment setting filing deadline, designed to address problem of “parties’ unwittingly losing their rights to

file post-judgment motions and appeals for lack of timely and mandatory notice to counsel”).

¶9 The trial court, however, is in the best position to determine, upon consideration of relevant evidence, whether Bann received timely notice of the July 22 order, and, if he did not, to grant him an additional extension of time in which to file a pro se petition, the only relief Bann now seeks. Accordingly, we grant review and grant Bann relief to the following extent: We vacate the court’s denial of Bann’s motion for rehearing and remand the case for further proceedings consistent with this decision. *See Rosario*, 195 Ariz. 264, ¶ 10, 987 P.2d at 228 (remand proper course).

/s/ *Peter J. Eckerstrom*

PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

/s/ *J. William Brammer, Jr.*

J. WILLIAM BRAMMER, JR., Judge

/s/ *Garye L. Vásquez*

GARYE L. VÁSQUEZ, Judge